Florida State University Journal of Land Use and Environmental Law

Volume 14
Number 2 *Spring 1999*

Article 2

April 2018

Improvements Under Florida's Butler Act: Can We Have a Definition Please?

Allan E. Wulbern

Improvements Under Florida's Butler Act: Can We Have a Definition Please?

Cover Page Footnote
I would like to thank my wife Fran for all of her love and support. Without her encouragement I would not have attended law school, much less written this paper. I would also like to thank Professor Donna R. Christie, Elizabeth C. and Clyde W. Atkinson Professor of Law, for her comments and suggestions regarding this Article.

IMPROVEMENTS UNDER FLORIDA'S BUTLER ACT: CAN WE HAVE A DEFINITION PLEASE?

ALLAN E. WULBERN*

Table of Contents

I. INTRODUCTION

The state of Florida has a unique relationship with the bodies of water that make up its boundaries and those rivers, lakes, streams, springs, and swamps that are within its boundaries. Over time this relationship has evolved from one of exploitation of these resources through development, to one that now recognizes their preciousness.[1] Until the latter half of this century, the belief was that these water resources could not be exhausted and that the highest and best use of lands submerged under water was to reclaim them and use them in commerce to attract settlers and capital resulting in development of the state and, most importantly, the addition of property to the government's tax rolls.[2]

Even prior to the days of environmental regulations, a landowner whose property was bounded by water was not free to develop or reclaim the lands under that water without some state action. Under the common law doctrine known as the Public Trust Doctrine, the sovereign owns all lands submerged under navigable waters.[3] Therefore, owners of property abutting lands submerged under navigable waters are not free to treat the submerged lands as their

* I would like to thank my wife Fran for all of her love and support. Without her encouragement I would not have attended law school, much less written this paper. I would also like to thank Professor Donna R. Christie, Elizabeth C. and Clyde W. Atkinson Professor of Law, for her comments and suggestions regarding this Article.

1. *See* CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 345 (1971).
2. *See id.*
3. *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455-56 (1892).

own.[4] This doctrine was well established in England after Lord Chief Justice Matthew Hale wrote the treatise De Jure Maris in 1670 in which he described the doctrine as the *jus publicum*.[5] The source of England's common law traces its roots back to the Roman Civil Code of Emperor Justinian I, which was written about 500 A.D.[6]

At the time the United States broke from England, the ownership of submerged lands under navigable waters was passed to the original thirteen colonies subject to the Public Trust Doctrine as it was then recognized in England.[7] The U.S. Supreme Court first stated this premise in *Martin v. Waddell*.[8] In that case the court stated that "when the revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use . . . ."[9] In *Pollard v. Hagan*,[10] the U.S. Supreme Court held that as new states were added to the Union, the title to the submerged lands under navigable waters within the boundaries of those states were passed to those states under a doctrine that is referred to as the Equal Footing Doctrine.[11]

In 1845 when Florida was admitted to the Union as the twenty-seventh state,[12] the title to the submerged lands under all navigable waters, estimated at five hundred thousand acres,[13] was vested in the state as public trust lands under the Equal Footing Doctrine.[14] Additionally, the state acquired approximately five hundred thousand acres of non-navigable swamp and overflowed lands from the federal government through the Swamp and OverFlowed Lands Act of 1850.[15]

The Florida legislature, in 1851, considered the development of Florida's submerged lands to be of primary importance for the economic growth of the state.[16] In order to facilitate this growth, the

---

4. *See* Shively v. Bowlby, 152 U.S. 1, 13 (1894) (discussing the King of England's ability to tear down structures built over submerged lands).

5. *See id.* at 11.

6. *See* 1 GEORGE M. COLE, WATER BOUNDARIES 5 (1983).

7. *See id.*

8. 41 U.S. (16 Pet.) 367 (1842).

9. *Id.* at 410.

10. 44 U.S. (3 How.) 212 (1845).

11. *See id.* at 224.

12. *See* TEBEAU, *supra* note 1, at 131.

13. *See id.* at 189.

14. See Pollard, 44 U.S. (3 How.) at 224.

15. *See* TEBEAU, *supra* note 1, at 189.

16. *See* Jacksonville Shipyards, Inc. v. Department of Nat. Resources, 466 So. 2d 389, 391 (Fla. 1st DCA 1985).

legislature passed what is commonly referred to as the Riparian Rights Act of 1856 (Riparian Rights Act).[17] The Riparian Rights Act encouraged development of submerged lands by giving title to the upland owner of the submerged lands who filled in such lands adjacent to his or her own.[18] The preamble to the Riparian Rights Act stated that improving and developing water front property would benefit the entire state, because as long as the state owned the submerged lands the riparian owners would not improve their water lots.[19]

In 1921, the legislature clarified some of the terms of the Riparian Rights Act through a statute commonly referred to as the Butler Act.[20] The "creation or evolution of commerce in connection with the ports of the State" was a major objective of the Butler Act.[21] When the statute was passed, the legislature considered that the public trust required encouraging the development of water front property.[22] The preamble to the Butler Act also stated that improving and developing water front property would benefit the entire state, because as long as the state owned the submerged lands riparian owners would not improve their water lots.[23] The Florida Supreme Court stated that the Butler Act and the Riparian Rights Act were only created to encourage the improvement of submerged lands and to improve the foreshore for commerce and navigation purposes.[24] Another purpose was the improvement of water from property by upland owners.[25] While the Butler Act did recognize the existence of the Public Trust Doctrine, stating that "[n]othing in this Act contained shall be construed to prohibit any person from boating, bathing or fishing in water covering the submerged lands of this State," it severely limited the public's interest in submerged lands under navigable waters by stating that such privileges only existed until the riparian owners filled in or improved the submerged lands.[26] Under the Butler Act, the state divested itself of:

> All right, title and interest to all lands covered by water lying in front of any tract of land owned by . . . any person, natural or

---

17. *See* Act effective Dec. 27, 1856, ch. 791, 1856 Fla. Laws 25.
18. *See id.*
19. *See id.*
20. *See* Act effective June 1, 1921, ch. 8537, 1921 Fla. Laws 332.
21. Jacksonville Shipyards, Inc., 466 So. 2d at 391.
22. *See id.*
23. *See id.*
24. *See* Duval Eng'g. & Contracting Co. v. Sales, 77 So. 2d 431, 433 (Fla. 1954).
25. *See* Jacksonville Shipyards, Inc., 466 So. 2d at 391.
26. *See* Act effective June 1, 1921, ch. 8537, § 8, 1921 Fla. Laws 332.

> artificial, or by any municipality, county or governmental corporation organized under the laws of Florida, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vests the full title to the same, subject to said trust in and to the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to affect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in to erect warehouses, dwellings or other buildings and also the right to pre vent encroachments of any other person upon all such submerged land . . . .
>
> Provided, that the grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands, and shall in no wise affect such submerged lands until actually filled in or permanently improved . . . .[27]

By the express terms of the statute, anyone (including individuals, corporations, municipalities or other political subdivisions of the state, or any entity capable of owning real property in Florida) who owned property abutting a navigable body of water could extend the boundaries of their property by bulkheading, filling in, or permanently improving from the high water mark in the direction of the navigable channel, so long as the bulkhead, fill, or improvements did not interfere with the navigability of the waterway.[28]

By implication, the Butler Act was partially repealed in 1951 when the legislature enacted 26-776, Laws of Florida (1951) which provided that, "[e]xcept as to lands in Dade and Palm Beach counties, the title to all sovereignty tidal water bottoms . . . is vested in the Trustees of the Internal Improvement Fund of the State of Florida . . . ."[29] The courts have construed the above language limiting the repeal of the Butler Act to "sovereignty tidal water bottoms" to mean that the Butler Act encompassed water bodies that were navigable regardless of whether the water body was tidally

---

27. *Id.* § 1.
28. *See id.*
29. Act effective May 29, 1951, ch. 26-776, §1, 1951 Fla. Laws 554, 555.

influenced.[30] In *Department of Natural Resources v. Industrial Plastics Technology, Inc.*,[31] the court held that because the improvements that were the subject of that case were built during the time period from 1949 to 1954, and those improvements were found to have been built on a non-tidally influenced body of water, the 1951 repeal of the Butler Act did not apply in that case.[32]

It was not until 1957 that the Butler Act was expressly repealed by the enactment of the Bulkhead Act of 1957 (Bulkhead Act).[33] However, the statute provided that "title to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each such owner."[34] Because the Bulkhead Act expressly provided that submerged lands that were already "filled or developed" under the Butler Act were vested in the riparian owner of those lands,[35] Florida courts continue to interpret the language of the Butler Act to determine whether a property owner, prior to 1951 if a tidally influenced water body or prior to 1957 if a non-tidally influenced water body, has filled, bulkheaded, or improved submerged lands under a navigable water body. While "filled" and "bulkheaded" are easily defined terms and easily subject to factual determinations, the courts have wrestled with what constitutes an improvement.

In *Jacksonville Shipyards, Inc., v. Department of Natural Resources*,[36] the First District Court of Appeal, in considering whether Jacksonville Shipyards had made improvements on submerged lands adjacent to its property, determined that in addition to piers, docks, wharves, dry docks, and railroad trestles, permanent improvements included continuous, bi-annual dredging of lands that were still submerged.[37] In *Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*,[38] the Third District Court of Appeal, while recognizing that the First District Court of Appeal in *Jacksonville Shipyards, Inc.* did not directly address whether "dredging alone is a permanent improvement sufficient to convey title to a riparian owner under the Butler Act," decided on the facts presented

---

30. Department of Nat. Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303, 1306-07 (Fla. 5th DCA 1992).

31. 603 So. 2d 1303 (Fla. 5th DCA 1992).

32. *See id.* at 1307.

33. *See* Act effective June 11, 1957, ch. 57-362, § 9, 1957 Fla. Laws 806.

34. FLA. STAT. § 253.129 (1997).

35. *See* Act effective June 11, 1957, ch. 57-362, § 9, 1957 Fla. Laws 806.

36. 466 So. 2d 389 (Fla. 1st DCA 1985).

37. *See id.* at 390.

38. 683 So. 2d 144 (Fla. 3d DCA 1996).

that dredged areas "either directly beneath the dock improvement or within fifty feet of the dock and mooring areas in the direction of the channel" were improvements under the Butler Act, and ruled that the Board of Trustees of the Internal Improvement Trust Fund ("BOT") had been divested of the title of the submerged lands in question by virtue of the Butler Act.[39]

The most recent case addressing the question of what constitutes "improvements" under the Butler Act was *City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund*.[40] *City of West Palm Beach* involved a situation almost identical to the one in *Key West Conch Harbor, Inc.*[41] As was the case with Key West, the city of West Palm Beach was claiming ownership of the footprints of four piers of a large municipal marina that the city built on the intracoastal waterway, along with the boat basin in the area between piers and a channel from the boat basin to the channel of the intracoastal waterway.[42]

In making its claim under the Butler Act, the city of West Palm Beach relied on the two cases that appeared to be directly on point, *Jacksonville Shipyards, Inc.*[43] and *Key West Conch Harbor, Inc.*[44] The court, however, determined that although it appeared that the First District Court of Appeal in *Jacksonville Shipyards, Inc.* determined that dredging constituted an improvement under the Butler Act, it was not clear that the issue of whether dredging constituted an improvement was actually argued in the appeal.[45] Consequently, the Fourth District Court of Appeal in *City of West Palm Beach* held that dredging was not an improvement under the Butler Act, and therefore, the title to the boat basin and the dredged channel leading to the channel of the intracoastal waterway was not vested in the city of West Palm Beach under the Butler Act, but rather the title remained in the name of the BOT.[46]

The purpose of this Comment is to use cases decided under the Riparian Rights Act and the Butler Act, focusing the discussion on

---

39. *Id.* at 145-46.

40. 714 So. 2d 1060 (Fla. 4th DCA 1998).

41. *Compare* Board of Trust. of the Int. Imp. Trust Fund v. Key West Conch Harbor, Inc. 683 So. 2d 144 (Fla. 3d DCA 1996), *with* City of West Palm Beach v. Board of Trust. of the Int. Imp. Trust Fund, 714 So. 2d 1060 (Fla. 4th DCA 1998).

42. *See* City of West Palm Beach, 714 So. 2d at 1060.

43. 466 So. 2d 389 (Fla. 1st DCA 1985).

44. 683 So. 2d 144 (Fla. 3d DCA 1996).

45. *See* City of West Palm Beach, 714 So. 2d at 1065 (discussing *Jacksonville Shipyards, Inc.*, 466 So. 2d at 391).

46. *See id.* at 1060.

Jacksonville Shipyards, Inc.,[47] *Key West Conch Harbor, Inc.*,[48] and *City of West Palm Beach*,[49] to show why the Florida Legislature should enact a statute authorizing the BOT to clarify the definition of improvements under the Butler Act by promulgating a rule.

Part Two of this Comment discusses the problems that courts have found in defining "improvements" under both the Riparian Rights Act and the Butler Act. Although this Part will discuss all of the cases that interpret the meaning of the term improvements under both acts, the primary focus will be on the *Jacksonville Shipyards, Inc.*, *Key West Conch Harbor, Inc.*, and *City of West Palm Beach* cases. Part Three will analyze alternatives that the legislature could consider in solving the problem caused by its imprecise definition of what constitutes an improvement under the Riparian Rights Act and the Butler Act.

The conclusion will summarize the problems that currently exist because of the imprecise statutory term "improvements," restate the need for a legislative solution and propose a solution that will fulfill both public and private expectations, while reducing the need for judicial determinations of the ownership of submerged lands.

II. DEFINING IMPROVEMENTS UNDER THE RIPARIAN RIGHTS ACT AND THE BUTLER ACT.

Florida courts have been grappling with what actually constitutes an improvement under the Riparian Rights Act and the Butler Act for a number of years. The earlier cases recognized that both of these acts were contrary to the common law Public Trust Doctrine. However, since the repeal of the Butler Act in 1957, most courts have been more expansive in their reading of the Butler Act and have all but ignored the Public Trust Doctrine.

A. The Early Cases Interpreting the Riparian Rights Act and the Butler Act.

The Florida Supreme Court first addressed whether a dock would be considered an improvement under the Butler Act in 1931 in *Williams v. Guthrie*.[50] *Williams* involved a dispute between two private parties who both claimed ownership of a dock on submerged

47. 466 So. 2d 389 (Fla. 1st DCA 1985).
48. 683 So. 2d 144 (Fla. 3d DCA 1996).
49. 714 So. 2d 1060 (Fla. 4th DCA 1998).
50. 102 Fla. 1047, 137 So. 682 (Fla. 1931).

lands.[51] Williams acquired the dock in question through mesne conveyances from an ancestor of the Guthrie heirs.[52] The Guthrie heirs brought an action of ejectment against Williams, claiming that the deed through which Williams claimed title to the dock and submerged lands reserved the fee in the dock and that the deed granting the uplands to Williams did not include a grant of the dock and the submerged lands lying under the dock.[53]

The court determined that if a private owner through a deed could convey the title to the dock, then the deed did in fact reserve the fee for the Guthrie heirs.[54] The question for the court, however, turned not on the deed, but rather on whether Guthrie even had title to the dock that could be conveyed.[55] The court stated that:

> It has . . . been held in this state that private parties cannot by ejectment recover possession of lands under navigable waters when such parties have no legal title to or right to use the land, and even when the title is in private parties a recovery of possession is subject to the rights of the public in the waters.[56]

The court determined that the dock was a "purpresture," which "is an invasion of the right of property in the soil while the same remains in the king or sovereign."[57] A purpresture "exists when anything is unjustly encroached upon against the king or the sovereign, as in the royal demesnes or in obstructing public ways or in turning public waters from their right course, or when any one has built an edifice in the city on the king's street."[58] The court determined that because the dock was a purpresture, a private party could not bring an action of ejectment when the action was based on the weakness of his adversary's title rather than the strength of his own.[59]

The Guthrie heirs requested a rehearing by the court to determine whether the Butler Act had in fact vested them with the title to the submerged lands under the dock, giving them the "strength of title" that the court required for an action for ejectment.[60] The court

---

51. *See id.* at 1049, 137 So. at 684.
52. *See id.*
53. *See id.*, 137 So. at 683.
54. *See id.* at 1050-51, 137 So. at 684.
55. *See id.* at 1051-52, 137 So. at 684.
56. *Id.* at 1052, 137 So. at 684-85.
57. *Id.* at 1053, 137 So. 685-85 (citing Town of Brookhaven v. Smith, 80 N. E. 665 (N.Y. 1907)).
58. *Id.* (citing City of Montpelier v. McMahon, 81 A. 977 (Vt. 1911)).
59. *See id.*
60. *See id.* at 1056, 137 So. at 686.

denied the Guthrie heirs' request for a rehearing even though its original opinion had not addressed whether the title to the submerged lands under the dock had vested in the Guthries by virtue of the Butler Act. The court stated that "[t]he dock for which recovery was sought was not essentially such a permanent improvement of the character required by the Riparian Rights Act as to vest title in the riparian proprietor . . . ."[61]

Prior to the repeal of the Butler Act, it was a matter of course for courts determining ownership of submerged lands based on a claim under the Riparian Rights Act or the Butler Act to strictly construe the statute against the individual making a claim of ownership against the state under one of those acts.[62] Unlike most grants of title, which are to be construed against the grantor, the courts have predominantly construed grants under the Riparian Rights Act and the Butler Act "most beneficially in favor of the state or public, and against the grantee."[63]

State v. Black River Phosphate Co.[64] was the first case to actually make a determination of the ownership of submerged lands under the Riparian Rights Act.[65] It appears that the state was fighting the Black River Phosphate Co.'s claim to the submerged lands under Black Creek because the state was seeking repayment for the valuable phosphates that Black River Phosphate Co. had removed from the bed of Black Creek.[66] In *Black River Phosphate Co.*, the Florida Supreme Court held that under the Riparian Rights Act, "[t]he use of [submerged] lands, and the waters over them, in the digging and removing of phosphates or other substances on or beneath their surface for gain is not within either the expression or the implication of [the] terms, or the purpose or intent of the statute."[67]

The riparian owner, Black River Phosphate Co., claimed that the Riparian Rights Act actually vested the company with the submerged lands in Black Creek where the company was mining for phosphate in the riverbed.[68] The terms of the Riparian Rights Act

---

61. *See id.* at 1055, 137 So. at 686.

62. *See* State v. Black River Phosphate Co., 32 Fla. 82, 106, 13 So. 640, 648 (Fla. 1893).

63. *Id.* at 107, 13 So. at 648.

64. 32 Fla. 82, 13 So. 640 (Fla. 1893).

65. *See* Geiger v. Filor, 8 Fla. 325 (Fla. 1856) (holding that the Riparian Rights Act was only applicable to riparian owners whose title extended to the low water line. By doing so, under the facts of the case, the court was able to avoid addressing the legality of the statute).

66. *See* Black River Phosphate Co., 32 Fla. at 128, 13 So. at 655.

67. *Id.* at 113, 13 So. at 650.

68. *See id.* at 83, 13 So. at 640.

stated that it was "for the benefit of [c]ommerce, that wharves be built and [w]arehouses erected," and that because the state was the owner of all submerged lands, riparian owners were prevented from improving their waterfront lots.[69] Under the Riparian Rights Act for the consideration of the above benefits to commerce, the state divested itself of:

> [A]ll right, title, and interest to all lands covered by water lying in front of any tract of land owned by a citizen of the United States or by the United States, for public purposes, lying upon any navigable stream, or [b]ay of the [s]ea, or [h]arbor, as far as to the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the [b]ay or [h]arbor as far as may be necessary to effect the purposes described, and to fill up from the shore, bank or beach, as far as may be desired, not obstructing the channel, but leaving full space for the requirements of [c]ommerce, and upon lands so filled in, to erect warehouses or other buildings, and also the right to prevent encroachments of any other person, upon all such submerged land in the direction of their lines continued to the channel, by bill in chancery, or at law, and to have and maintain action of trespass in any [c]ourt of competent jurisdiction in the [s]tate, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands, for the purposes within mentioned.[70]

It is unclear from the text of the statute that the state did not actually make a wholesale grant of the submerged lands to riparian owners. The argument made by the Black River Phosphate Co. that the state divested itself of all submerged lands "in front of any tract of land ... lying upon any navigable stream, or [b]ay of the [s]ea, or [h]arbor, as far as to the edge of the channel, [and vesting] the full title to the same in and unto the riparian proprietors . . ." is well supported by the actual terms of the Riparian Rights Act.[71]

The court in *Black River Phosphate Co.* applied the rule that all grants by the government "are to be strictly construed, or be taken most beneficially in favor of the state or public, and against the grantee."[72] The court believed that the Public Trust Doctrine required an even stricter reading of the grant because the statute did

69. *See* Act effective Dec. 27, 1856, ch. 791, 1856 Fla. Laws 25.
70. *Id.*
71. *Id.*
72. Black River Phosphate Co., 32 Fla. 106-07, 13 So. at 648.

not merely convey title to land, but it also conveyed "a portion of that public domain which the government held in a fiduciary relation for general and public use."[73] In defining the Public Trust Doctrine in Florida, the court stated that:

> [T]he navigable waters of the state and the soil beneath them, including the shore or space between high and low water marks, were the property of the state, or of the people of the state in their united or sovereign capacity, and were held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the state for at least the purposes of navigation and fishing and other implied purposes; and the lawmaking branch of the government of the state, considered as the fiduciary or representative of the people, were, when dealing with such lands and waters, limited in their powers by the real nature and purposes of the tenure of the same, and must be held to have acted with a due regard for the preservation of such lands and waters to the uses for which they were held.[74]

The court held that the Riparian Rights Act did not constitute an "absolute and unqualified gift to individual proprietors of land intervening the shore or banks and the channel," but rather, the statute was only a conditional grant.[75] The court held that until the riparian owner makes some improvements on the submerged lands, the owner has no more rights to the land or the water above it than any other citizen has.[76]

A plain reading of the Riparian Rights Act would have yielded a contrary result.[77] Support for Justice Mabry's dissenting argument can be found in the annotations to the act, which were published in the 1856 Florida Laws.[78] The annotations to section one of the Act state that the "[r]ight of State to submerged lands [are] granted to [r]iparian proprietors" and that riparian owners "[m]ay prevent encroachments and trespasses" over those submerged lands.[79]

The court in *Black River Phosphate Co.* clearly had the U.S. Supreme Court's holding in *Illinois Central Railroad Co. v. Illinois*[80] in mind when it restricted the terms of the Riparian Rights Act to

---

73. *Id.* at 107, 13 So. 648.
74. *Id.* at 106, 13 So. 648.
75. *See id.* at 108, 13 So. 648.
76. *See id.* at 112, 13 So. at 650 (J. Mabry dissenting).
77. *See id.* at 136, 13 So. 657.
78. *See* Act effective Dec. 27, 1856, ch. 791, 1856 Fla. Laws 25.
79. *Id.*
80. 146 U.S. 387 (1892).

require filling or improvement of the submerged lands in order to fulfill the conditions of the legislative grant.[81] In *Illinois Central Railroad Co.*, decided a year before *Black River Phosphate Co.*, the Court held that a legislative grant of an area of submerged lands under Lake Michigan which exceeded 1,000 acres was "necessarily revocable, and the exercise of the trust by which the property was held by the state [could] be resumed at any time."[82] The Court did state that submerged lands subject to the Public Trust Doctrine could be alienated when the parcels would be used in a manner that fit within the public interest.[83]

The Florida Supreme Court recognized that to strictly construe the terms of the Riparian Rights Act would be in direct conflict with the terms of the U.S. Supreme Court's decision in *Illinois Central Railroad Co.*[84] To keep from ruling that the statute was not an invalid action on behalf of the legislature, the court determined that the grant was conditioned on the riparian owner improving the submerged lands in a manner that facilitated "the landing and storage of goods, or benefit of commerce."[85]

The holding from *Black River Phosphate Co.* was adopted by the legislature twenty-eight years later when it enacted the Butler Act in 1921. Under the Butler Act, the legislature clarified the grant under the Riparian Rights Act to:

> [A]pply to and affect only those submerged lands which have been, or may be hereafter, actually bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands, and shall in no wise affect such submerged lands until actually filled in or permanently improved.[86]

It is clear that the legislature was codifying the holding from *Black River Phosphate Co.*, not only because the grant was specifically made conditional on the riparian owner's act of filling in or permanently improving the submerged lands, but also because section four of the statute reserved from the grant the natural resources of the submerged lands of "all natural oyster beds upon and all minerals and oils in or under the submerged lands until the same shall be

---

81. *See* Black River Phosphate Co., 32 Fla. 103-05, 13 So. at 647.
82. Illinois Cent. R.R. Co., 146 U.S. at 437-38, 455.
83. *See id.* at 455-56.
84. *See* Black River Phosphate Co., 32 Fla. 107, 13 So. at 648.
85. *Id.* at 114, 13 So. at 650.
86. Act effective June 1, 1921, ch. 8537, § 1, 1921 Fla. Laws 332-33.

filled in and improved by the riparian owner."[87] This reservation makes it clear that any future riparian owners cannot make a claim for phosphates or other minerals under submerged lands until they have actually filled in or improved the lands.

B. Cases Following the Repeal of the Butler Act

One of the interesting aspects of the Riparian Rights Act and the Butler Act is the fact that even though both Acts have been repealed for many years, the repealing legislation of the Butler Act still allows claims to be made under that act.[88] The history of the repeal of the Butler Act is an interesting topic in and of itself. In 1951, the legislature vested title to all lands under tidally influenced waters outside of Dade and Palm Beach counties in the Trustees of the Internal Improvement Trust Fund.[89] The courts have interpreted this legislative action as an implied repeal of the Butler Act that is limited to submerged lands under tidally influenced waters.[90] It was not until 1957 that the Butler Act was expressly repealed by the Bulkhead Act.[91]

The interpretation that the Butler Act was implicitly repealed in 1951 was determined in *Department of Natural Resources v. Industrial Plastics Technology, Inc.*[92] In that case, the court was determining whether Industrial Plastics Technology, Inc. owned submerged lands by virtue of a dock and a boathouse that were built in 1954 over submerged lands of the St. Johns River near the fishing community of Welaka, Florida.[93] Because the dock and boathouse were built after the legislature passed the law vesting tidal lands owned by the state in the name of the Trustees of the Internal Improvement Trust Fund, and stating that "[a]ll laws and parts of laws in conflict herewith, except section 253.06, *Florida Statutes*,[94] which is specifi-

---

87. *Id.* § 4.

88. *See* FLA. STAT. § 253.129 (1997) (requiring the Trustees of the Internal Improvement Trust Fund to issue a disclaimer to any owner of lands filled or developed under the Butler Act).

89. *See* Act effective May 29, 1951, ch. 26-776, 1951 Fla. Laws 554 (codified at FLA. STAT. § 253.10 (1951)).

90. *See* Department of Nat. Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303, 1307 (Fla. 5th DCA 1992); *see also supra* text accompanying note 21.

91. *See* Act effective June 11, 1957, ch. 57-362, § 9, 1957 Fla. Laws 806, 812 (current version at FLA. STAT. § 253.129 (1997)).

92. 603 So. 2d 1303 (Fla. 5th DCA 1992).

93. *See id.* at 1304.

94. FLA. STAT. § 253.06 (1951) (vesting title to certain tidal lands in Dade and Palm Beach County in the name of the BOT).

cally reaffirmed, are hereby repealed,"[95] the court felt compelled to ask why the legislature would expressly overrule the Butler Act through chapter 57-362, Florida Laws (1957) six years later. The court focused on the language of chapter 26-776, which only transferred state vested tidal lands to the Trustees of the Internal Improvement Trust Fund.[96] In finding that the Butler Act was still in effect for non-tidally influenced waters, the court asked and answered:

> [I]f [c]hapter 26-776 repealed the Butler Act in 1951, why was the express repealer of [c]hapter 57-362 necessary? It was only needed if the Butler Act had some continued sphere of impact remaining after 1951. Comparing the Butler Act with [c]hapter 26-776, it can be seen that the Butler Act encompassed a wider segment of submerged land than did [c]hapter 26-776. All submerged lands were covered in the Butler Act. Only tidal lands outside Dade and Palm Beach Counties are covered by [c]hapter 26-776.
>
> Thus, it could be logically possible for both the Butler Act and [c]hapter 26-776 to coexist from 1951 to 1957. The Butler Act then covered all freshwater submerged lands and tidal lands in Dade and Palm Beach Counties. Chapter 26-776 covered only tidal submerged lands in all but Palm Beach and Dade Counties.[97]

The court went on to make a factual determination that the point of the St. Johns River where the submerged property was located was neither tidal nor influenced by the Atlantic Ocean.[98] The court held that because the St. Johns was "fresh water," it was "like the other large fresh water navigable lakes in central Florida."[99]

This opinion can be criticized for failing to follow the guidance laid out by the Florida Supreme Court in *Black River Phosphate Co.*[100] where the court stated that all grants of state lands, especially lands submerged under navigable waters, should be read against the grantee.[101] If the court had followed this maxim, then it may have been less inclined to have made a factual determination at the appellate level that the area of the St. Johns River in question was not tidally influenced. In fact, in a case decided in the same circuit two years later, *Chiles v. Floridian Sports Club, Inc.*,[102] the court held that

---

95. *See* Act effective May 29, 1951, ch. 26-776, § 3, 1951 Fla. Laws 554-55.
96. *See id.* § 1.
97. Department of Nat. Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303, 1306-07 (Fla. 5th DCA 1992).
98. *See id.* at 1307.
99. *Id.*
100. 32 Fla. 82, 13 So. 640 (Fla. 1893).
101. *See id.* at 107, 13 So. at 648.
102. 633 So. 2d 50 (Fla. 5th DCA 1994).

its previous determination in *Industrial Plastics Technology, Inc.* that the exact same portion of the St. Johns River near Welaka, Florida was not tidally influenced, did not foreclose a subsequent determination that the area was in fact tidally influenced.[103] The court in *Floridian Sports Club, Inc.* determined that evidence introduced at the trial level of that case showed that the St. Johns River near Welaka in fact "rises and falls approximately five inches during the tide changes."[104] The court admitted that it made the determination that the St. Johns near Welaka was not tidal without any evidence to prove or disprove that fact.[105]

The court in *Industrial Plastics Technology, Inc.* could have avoided finding that chapter 26-776 was only a partial repeal of the Butler Act. The Florida Supreme Court had construed chapter 26-776 in an earlier decision, *Duval Engineering and Contracting Co. v. Sales*.[106] There the court assumed that the Butler Act had been repealed in 1951.[107] The court stated that "unless the upland owner has bulkheaded and filled in the submerged lands in front of his uplands he has acquired no title therein and they may be subject to sale pursuant to [c]hapter 26-778, Acts of 1951, the condition of the grant not having been fulfilled."[108]

Interestingly, the attorney for Duval Engineering and Contracting Co., which was claiming that the Butler Act had been repealed, was none other than J. Turner Butler, the namesake of the Butler Act.[109] If the Butler Act had only been implicitly repealed in 1951, it seems to have been news to everyone in 1994 when the Fifth District Court of Appeals decided that was the case. Just nine years earlier, the First District Court of Appeals in *Jacksonville Shipyards, Inc.*,[110] determined that only improvements made prior to May 29, 1951, the effective date of chapter 26-776, could be considered for the purposes of a Butler Act grant.[111]

The court in *Industrial Plastics Technology, Inc.* differentiated the facts in that case from those of *Duval Engineering and Construction Co.* and *Jacksonville Shipyards, Inc.* by stating that chapter 26-776 applied only to tidally influenced waters and that those cases were decided

---

103. *See id.* at 50-51.
104. *Id.* at 52, n.4.
105. *See id.* at 52.
106. 77 So. 2d 431 (Fla. 1954).
107. *See id.* at 433.
108. *Id.*
109. *See id.* at 432.
110. 466 So. 2d 389 (Fla. 5th DCA 1985).
111. *See id.* at 390.

on the basis that the submerged lands in question were in an area of the St. Johns River that is unquestionably tidally influenced.[112] The court could have avoided creating this opening for more claims under the Butler Act if it had made its determination based on facts rather than an erroneous assumption as to whether the submerged lands in question were under tidal waters.

It would also appear to be clear from the court's language in *Williams v. Guthrie*[113] that the Florida Supreme Court did not consider a dock to be an improvement under the Butler Act.[114] The court in *Industrial Plastics Technology, Inc.*[115] went to great lengths to differentiate the facts under that case from those of *Williams*.[116] The *Industrial Plastics Technology, Inc.* court read *Williams* to have little meaning outside of the context of a squabble for land between two individuals where the state is not a party to the action.[117] The court in *Williams* found that even though there was no question that there was a dock constructed on submerged lands, the plaintiffs had failed to allege in its pleadings or prove by its evidence that the dock was an "improvement" for purposes of the Butler Act.[118] It is unclear what the plaintiffs could have done to further prove that the dock was an improvement, as the court had no problem recognizing the fact that the dock did exist.[119] In fact, the point of the litigation was to determine who owned the dock.[120]

The court in *Industrial Plastics Technology, Inc.* regarded the Florida Supreme Court's statements in *Williams* on whether a dock was an improvement to be dicta because the fact was not adjudicated.[121] The *Industrial Plastics Technology, Inc.* court also noted that the *Williams* court questioned the jurisdiction of the trial court to take the title to the submerged land away from the state since the state was not even a party to the suit.[122] The court in *Industrial Plastics Technology, Inc.* appears to have misinterpreted the *Williams* court's explanation for requiring the plaintiff to have specifically pled ownership of the property by virtue of the Butler Act. The *Williams*

---

112. *See* Department of Nat. Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303, 1306 (Fla. 5th DCA 1992).

113. 102 Fla. 1047, 137 So. 682 (Fla. 1931).

114. *See id.* at 1055, 137 So. at 686.

115. 603 So. 2d 1303 (Fla. 5th DCA 1992).

116. *See id.* at 1306.

117. *See id.*

118. *See* Williams, 102 Fla. at 1055, 137 So. at 686 (Fla. 1931).

119. *See id.*

120. *See id.* at 1050, 132 So. at 683.

121. *See* Industrial Plastics Tech., Inc., 603 So. 2d at 1306.

122. *See id.*

court was merely restating the doctrine that grants by the state will be strictly construed and read in favor of the state.[123] In dicta discussing the jurisdiction of the courts to adjudicate the ownership of land under the Butler Act when the state is not a party, the *Williams* court stated that the courts will not have jurisdiction unless the party seeking to claim ownership of submerged lands under the Butler Act pleads and proves "that the rights of the state have been lawfully divested under the statutes . . . ."[124] That statement could be interpreted to mean that in order for the lower court to have had jurisdiction, the Guthries needed to have included a claim under the Butler Act in their original pleadings.

Ultimately, the court in *Industrial Plastics Technology, Inc.* extended the holding from *Jacksonville Shipyards, Inc.*,[125] which held that "[p]iers, docks, wharves, dry-docks, and railroad trestles, comprising much concrete and steel" were improvements for purposes of the Butler Act.[126] The court in *Industrial Plastics Technology, Inc.* held that the fact that the dock was wooden and was not used for commercial activities was of no consequence.[127] While the court correctly stated that the Butler Act did not limit the definition of "permanent improvements" to strictly commercial-type uses,[128] the court violated the tenant of statutory construction of the Butler Act stating that grants under that act are to be construed against the grantee.[129] Instead of following that rule of construction and following the implied holding of the Florida Supreme Court in *Williams*,[130] the court followed the dicta of *State v. A.J. Industries, Inc.*,[131] a case from the Alaska Supreme Court, construing a grant under a statute similar to the Butler Act.[132]

According to the court in *Industrial Plastics Technology, Inc.*, the Alaska Supreme Court had defined improvements "to include buildings, wharfs, piers, dry-docks and other structures affixed to tidal or submerged lands, which were constructed for business,

---

123. *See* Williams, 102 Fla. at 1056, 137 So. at 686 (stating that the plaintiff seeking ownership of land must plead "sufficient facts *to negative the presumptive title of the state* . . . ." (emphasis added)).

124. *Id.*

125. 466 So. 2d 389 (Fla. 1st DCA 1985).

126. *See* Industrial Plastics Tech., Inc., 603 So. 2d at 1305 (discussing Jacksonville Shipyards, Inc. v. Department of Nat. Resources, 466 So. 2d 389, 390 n.3 (Fla. 1st DCA 1985)).

127. *See id.* at 1306.

128. *See id.*

129. *See supra*, text accompanying notes 71-76.

130. 102 Fla.. 1047, 137 So. 682 (Fla. 1931); *see also supra*, text accompanying notes 50-61.

131. 397 P. 2d 280 (Alaska 1964).

132. *See id.* at 282-83.

commercial, recreational, residential or other beneficial use or purposes."[133] In addition to the fact that there was no reason for the court to look at decisions of other jurisdictions to make its decision, the *Industrial Plastics Technology, Inc.* court was misguided in its reliance on *A.J. Industries, Inc.* for several reasons. First, the improvements discussed in *A.J. Industries, Inc.* were substantial commercial improvements on filled lands that included a radio station, a barge stall, and a trestle and conveyor system.[134] None of the improvements were non-commercial in nature.[135] Second, the definition for improvements that was attributed to the Alaska Supreme Court actually was the definition provided for that term in the Alaska Administrative Code.[136] The definition for improvements provided in the Alaska Administrative Code was promulgated by the Alaska Department of Natural Resources,[137] that state's counterpart to the Florida Department of Natural Resources (DNR), which was a party to the suit in question.

Relying on the definition for improvements given by another state's department of natural resources (and ignoring the wishes of Florida's DNR), the court gave away submerged lands which were subject to the Public Trust Doctrine. These lands were given away because wooden docks and boathouses were treated as "improvements."[138] There is nothing in the court's opinion that would stop a riparian owner from doing anything more than proving that prior to the repeal of the Butler Act, there had been a dock over submerged lands and thus those lands had vested in the riparian owner. The court came to this conclusion by failing to consider either the Public Trust Doctrine or the rule stating that grants of public trust land are to be construed against the grantee.

The most recent conflict between the Public Trust Doctrine and the Butler Act has come about because of a vague determination by the First District Court of Appeal in *Jacksonville Shipyards, Inc.* that dredging was a permanent improvement.[139] In that case, Jacksonville Shipyards, Inc. filed a request for a disclaimer from the Governor and Cabinet as the BOT for 11.15 acres of submerged lands

---

133. Industrial Plastics Tech., Inc., 603 So. 2d at 1306 (citing State v. A.J. Indus. Inc., 397 P. 2d 280 (Alaska 1964)).

134. *See* A.J. Indus., Inc., 397 P. 2d at 285-87.

135. *See id.*

136. *See id.* (citing ALASKA ADMIN. CODE tit. 11, § 120.214 (1962)).

137. *See* ALASKA ADMIN. CODE tit. 11 § 120.214 (1997) (citing ALASKA STAT. § 38.05.020 (1997) for promulgating authority).

138. *See* Industrial Plastics Tech., Inc., 603 So. 2d at 1306.

139. 466 So. 2d 389 (Fla. 1st DCA 1985).

under the St. Johns River adjoining its upland property.[140] Commodores Point Terminal Corporation also filed an application for a disclaimer to 6.15 acres of submerged lands that adjoined its upland property.[141] The applications were made on the grounds that the submerged lands had been "filled or developed or permanently improved prior to May 29, 1951," the date that the Butler Act was repealed as to tidal waters.[142] After the applications had been filed, but prior to the issuance of the final order from the DNR, Jacksonville Shipyards, Inc. acquired the Commodores Point Terminal Corporation property.[143] The two applications for the disclaimer of 17.30 of submerged lands were treated as one. Through a final order issued by the DNR, the BOT denied the application for disclaimer on the ground that the applicants had not actually filled in the submerged lands.[144]

The First District Court of Appeal reversed the agency's final order on the basis that the Butler Act transferred ownership of submerged lands "which have been . . . actually bulkheaded or filled in or permanently improved."[145] In doing so, the court concentrated on the language of the Butler Act, which only required the submerged lands to be "permanently improved."[146]

Based on maps, plats, surveys, and photographs dated prior to May 29, 1951, the court determined that structural additions to the submerged lands in question, which included "piers, docks, wharves, dry docks, railroad trestles, and dredging" constituted improvements under the Butler Act.[147] The court can be criticized for failing to consider the Public Trust Doctrine when it made its factual determination as to what constituted an improvement. Two of the more questionable "improvements" were the 12,000-ton floating dry dock and the dredging of open waters, piers and dry docks.[148]

The fault may not be entirely laid at the feet of the First District Court of Appeal. Apparently, the DNR considered the application for the disclaimer under an all or nothing basis. DNR could have

---

140. *See id.* at 390.
141. *See id.*
142. *Id.*; *see also supra* text accompanying notes 89-99.
143. *See* Jacksonville Shipyards, Inc. v. Department of Nat. Resources, 466 So. 2d 389, 390 (Fla. 1st DCA 1985).
144. *See id* at 390-91.
145. *Id.* at 391 (citing Act effective June 1, 1921, ch. 8537, § 1, 1921 Fla. Laws 333).
146. *See id.*
147. *Id.* at 390.
148. *Id.*

argued that what constitutes an improvement under the Butler Act is a question of fact which, under the Florida Administrative Procedures Act (APA),[149] must be supported by competent substantial evidence in the record.[150] Judge Zhemer, who concurred in the opinion written by Judge Booth, later wrote in *Dyer v. Department of Insurance and Treasury*[151] that, when reviewing an agency order on appeal, it was not the function of the appellate court to substitute its "judgment for that of the agency as to the weight of the evidence on any disputed issue of fact . . . ."[152] If DNR had chosen to argue as a factual matter that floating dry-docks, which by definition are not attached to the submerged lands, and the area that was regularly dredged were not improvements under the Butler Act, the First District Court of Appeal would only have been able to set aside that determination if the court found that such findings were not supported by competent and substantial evidence.[153]

Whether the determination as to what constitutes an improvement is a finding of fact or finding of law is arguable. However, even if the court had found that what constitutes an improvement for purposes of the Butler Act is a finding of law, the courts afford agencies a "wide discretion in the interpretation of a statute which it administers" and will not overturn an agency's interpretation on appeal unless it is clearly erroneous.[154] It would be difficult for the court to have argued that an interpretation of improvement under the Butler Act that required a structure to be fixed to the submerged lands, not just floating over them, would have been a "clearly erroneous" interpretation of the Butler Act.[155] Under such an interpretation, the court could have avoided giving away significant tracts of submerged lands that were merely dredged for the purpose of floating dry-docks over them. The true travesty is that a significant portion of these lands is no longer used for shipyard purposes. In fact, because the shipyards closed down in 1990, the dry-docks are no longer located where they were in 1985.[156] Ironically, one of the

---

149. *See* FLA. STAT., ch. 120 (1983).

150. *See* FLA. STAT. § 120.68 (10) (1983).

151. 585 So. 2d 1009 (Fla. 1st DCA 1991).

152. *Id.* at 1013.

153. *See* FLA. STAT. § 120.68(10) (1983).

154. *See* Natelson v. Department of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984); Department of HRS v. Framat Realty, Inc., 407 So. 2d 238, 242 (Fla. 1st DCA 1981) (holding that "[p]ermissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views").

155. *See* Natelson, 454 So. 2d at 32.

156. *See Proposals Due for Navy Dry Dock*, FLA. TIMES-UNION, Dec. 9, 1996, at First Business 5.

two dry-docks discussed in the case currently resides off the coast of Jacksonville as the largest artificial reef on the U.S. East Coast, enhancing the public trust that it once was used to erode.[157]

Unflinchingly, the Third District Court of Appeal in *Key West Conch Harbor, Inc.*[158] followed the implied holding of *Jacksonville Shipyards, Inc.* which stated that dredging can constitute an "improvement" under the Butler Act. The court in *Key West Conch Harbor, Inc.* did recognize that the First District Court of Appeal in *Jacksonville Shipyards, Inc.* never specifically addressed whether the dredging constituted an improvement. It relied on the unstated inference that the owners of the shipyard had to keep the channels and the area around the dock at a sufficient depth to be able to move vessels in and out of the dock area.[159] From this implied rationale, the Third District Court of Appeal created a new rule for determining whether dredging constitutes a Butler Act improvement. The court stated that "the determination of what constitutes an' improvement' must be determined on a case-by-case basis. The surrounding land and other improvements under the Act must be considered in addition to the dredged land."[160] The rule given by the court could be better stated by saying that if the dredging is a requirement for the utility of the actual improvement then the dredging will be considered a "constructive improvement" of the submerged lands.

The idea that dredging is a "constructive improvement" is supported by Judge Gersten's dissenting opinion in *Key West Conch Harbor, Inc.* There, Judge Gersten criticized the majority for abandoning common sense, stating that "[c]ertainly dredging, under anyone's standards, cannot be deemed an' improvement.'"[161]

Recently, the Fourth District Court of Appeal was faced with the question of whether it would allow riparian owners to claim that dredging constituted a Butler Act improvement. In making its determination, the court in *City of West Palm Beach*[162] held that dredging could not constitute an improvement under any circumstances under the Butler Act.[163] In addressing the issue of what constitutes an improvement, the court in *City of West Palm Beach* was the first court since the repeal of the Butler Act in 1957 to address the

---

157. *See* Lawrence Dennis, *Tournament King Event Has Come Long Way*, FLA. TIMES-UNION, July 11, 1997, at C1.

158. 683 So. 2d 144 (Fla. 3d DCA 1996).

159. *See id.* at 146.

160. *Id.*

161. *Id.* at 147 (Gersten, J., dissenting).

162. 714 So. 2d 1060 (Fla. 4th DCA 1998).

163. *See id.* at 1061.

Public Trust Doctrine in making its determination of what constituted an improvement under that act.[164] Unlike the earlier post Butler Act cases, the court began its discussion of the case by reciting the Equal Footing Doctrine and the Public Trust Doctrine.[165] The court also recalled the doctrine that was spelled out in *State v. Black River Phosphate Co.*,[166] the earliest case that discussed the meaning of the term improvements under the Riparian Rights Act of 1857. In that case, the court stated:

> [T]he rule applicable to all grants by the government, which is that they are to be strictly construed, or be taken most beneficially in favor of the state or public, and against the grantee. It will not be presumed that anything was intended to pass that is not denoted by clear and special words.[167]

The court properly categorized the Butler Act as being "in derogation of [the] public trust," which required that the grant under the statute to be "strictly construed in favor of the sovereign."[168]

The court in *City of West Palm Beach* also relied on the terms of the Butler Act itself, which recognized the existence of the Public Trust Doctrine by its own terms, to determine that only when the improvement is one such that the public can no longer enjoy it rights to bathe, fish, or exercise will the improvement divest title of submerged lands to the state.[169] The court was able to reconcile its holding with that of *Jacksonville Shipyards, Inc.* because the court recognized that in that case, DNR was attempting to argue that a grant under the Butler Act required the upland owner to actually fill in the submerged lands.[170] The court considered *Jacksonville Shipyards, Inc.* to be informative only to the extent that it illustrated the type of improvement, in the absence of filling the submerged lands, that were contemplated by the act.[171] The court appears to have recognized that the dredged areas were only granted in that case

---

164. A search on Westlaw revealed that *City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund*, 714 So. 2d 1060 (Fla. 4th DCA 1998), was the only case decided since the repeal of the Butler Act that contained both the terms "Butler Act" and "public trust."

165. *See* City of West Palm Beach v. Board of Trust. of the Int. Improv. Trust Fund, 714 So. 2d 1060, 1061-63 (Fla. 4th DCA 1998).

166. 32 Fla.. 82, 13 So. 640 (Fla. 1893).

167. *See* City of West Palm Beach, 714 So. 2d at 1063 (citing State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (Fla. 1893)).

168. *Id.*

169. *See id.* at 1060.

170. *See id.* at 1065 (discussing Department of Nat. Resources v. Jacksonville Shipyards, Inc., 466 So. 2d 389 (Fla. 5th DCA 1982).

171. *See id.*

because DNR failed to put forth any argument other than "improvement" required actual filling of the submerged lands, and therefore, the court never "honed in on the issue of whether dredged land in the spaces between intense development was subject to the [Butler] Act."[172]

The court severely criticized *Key West Conch Harbor, Inc.*[173] for failing to look any further than *Jacksonville Shipyards, Inc.* for authority to give away state lands held in trust for the public.[174] The court further criticized *Key West Conch Harbor, Inc.* for creating an amorphous and loose "reasonableness" standard to determine on a case-by-case basis the issue of "title to irreplaceable submerged land within the public trust."[175]

While *City of West Palm Beach* is binding on trial courts and future appellate decisions in the Fourth District, it is merely influential in the Second and Fifth Districts. Because the court refused to certify the case for review as a question of "great public importance" or "in direct conflict with a decision of another district court of appeal," it is uncertain whether the Florida Supreme Court will decide once and for all whether dredging can constitute an improvement under the Butler Act.[176]

The Florida Supreme Court does have jurisdiction to hear the case if a writ of certiorari is requested by the city of West Palm Beach on the basis that the Fourth District Court of Appeal's decision was in direct conflict with the decision from at least one other district. However, unlike the U.S. Supreme Court, the Florida Supreme Court does not have the power to grant writs of certiorari.[177]

III. A LEGISLATIVE SOLUTION

Because of the conflict between the districts, and the failure of two of the district courts of appeal to follow the admonition of the Florida Supreme Court to read grants under the Butler Act against the grantee, the issue of determining what constitutes an improvement is ripe for a legislative solution. There are several options available to the legislature. The first of course would be to do

---

172. *Id.*

173. 683 So. 2d 144 (Fla. 3d DCA 1996).

174. *See* City of West Palm Beach v. Board of Trust. of the Int. Improv. Trust Fund, 714 So. 2d 1060, 1065. (Fla. 4th DCA 1998).

175. *Id.* at 1066.

176. *See* FLA. CONST. art. V, § 3(b)(3) (giving jurisdiction to the Florida Supreme Court to resolve decisions that directly conflict with another district court of appeal).

177. *See id.*

nothing, letting the courts resolve the issue over time. The second would be to set a time limit for any new claims for disclaimers for lands filled or improved prior to the repeal of the Butler Act. The third option would be to re-address the issue of what constitutes an improvement under the Butler Act and provide the BOT with the authority to craft a narrower definition for that term.

The first option, upholding the status quo, does nothing to solve the problem of allowing courts to give away valuable public trust lands for acts that occurred more than forty years ago. Under the present scheme, the property does not even have to be improved at the time the claim for a disclaimer is made. Reading the holding from *Jacksonville Shipyards, Inc.* it is clear that under the law as it is presently written the focus is on the condition of the property prior to the repeal of the Butler Act.[178] The fact that only one of the five courts that have addressed this issue in the past fifteen years mentioned the Public Trust Doctrine illustrates the need for a legislative solution to the problem.

There are several forms that a legislative solution could take. The first would be a repeal of section 253.129, *Florida Statutes*.[179] A repeal of section 253.129, however, could be subject to takings claims by individuals who own riparian lands that were "filled or developed" prior to the repeal of the Butler Act in 1957 because of the vesting language in both section 253.129 and the Butler Act.[180]

One concern that arises from an outright repeal of section 253.129 is that the State could wind up owning lands filled prior to the repeal of the Butler Act if the owners of the lands never filed for a disclaimer from the BOT as is required under that statute.[181] Section 253.12(9), *Florida Statutes*[182] addresses this concern. Section 253.12(9) actually revived and extended the effects of the Butler Act. Under section 253.12(9), the state divested itself of all of its "right, title, and interest to all tidally influenced land or tidally influenced islands bordering or being on sovereignty land, which have been permanently extended, filled, added to existing lands, or created before

178. *See* Jacksonville Shipyards, Inc., v. Department of Nat. Resources, 466 So. 2d 389, 390 n.3 (Fla. 1st DCA 1985) (discussing the improvements actually done on the submerged lands in question as of May 29, 1959).

179. FLA. STAT. § 253.129 (1997).

180. *See id.* (confirming title to all lands filled or developed prior to the repeal of the Butler Act, which vested title to riparian owners who bulkhead, fill, or permanently improve their adjacent submerged lands); *see also* Act effective June 1, 1921, ch. 8537, § 1, 1921 Fla. Laws 333.

181. *See* FLA. STAT. § 253.129 (1997).

182. FLA. STAT. § 253.12(9) (1997).

July 1, 1975," and granted title to those lands to the upland owners of those previously submerged lands.[183]

A more appropriate legislative solution would be to statutorily grant rulemaking authority to the BOT to define what constitutes an improvement under the Butler Act. As it stands, the BOT has no authority to adopt a rule defining "improvements" under the Butler Act. Florida's APA prohibits agencies from adopting rules unless the agency is adopting a rule under a specific legislative grant of rulemaking authority to "implement, interpret, or make specific . . . particular powers and duties granted by the enabling statute."[184] The legislature could grant BOT the authority to define what types of improvements will qualify for the purposes of evaluating whether the BOT should issue a disclaimer to riparian owners that have not filled in submerged lands but are claiming ownership under some other form of improvement. In drafting such legislation, it would be wise to specify whether the legislature intended improvements to include such things as docks, piers, and dredging. The legislature could further require that the BOT consider the Public Trust Doctrine in its rulemaking.

It is unclear, however, whether the legislature can authorize or grant rulemaking authority to an agency under a statute that has been repealed. Section 120.52(8)(g) of the Administrative Procedure Act specifically requires that the rule implements a specific law.[185] In order to avoid facing such a problem in statutory interpretation by the courts, the legislature could grant the rule making authority to the BOT to define the term "developed" under section 253.129, *Florida Statutes*.[186]

Granting the BOT the authority to formulate a rule to define the term "developed" would allow the BOT to restrict the definition given to that term by the courts. A rule would also result in an application of the Butler Act that would be consistent throughout the state rather than varying the application of that statute on a district by district basis as is now the case.[187]

---

183. *Id.*

184. FLA. STAT. § 120.52(8)(g) (1997) (defining invalid exercises of legislative authority by state agencies).

185. *See id.*

186. *See* FLA. STAT. § 253.129 (1997) (confirming "title to all lands heretofore filled or developed")..

187. *See* discussion *infra* Part III.B.

IV. CONCLUSION

In derogation of the Public Trust Doctrine, the state has allowed private individuals to develop submerged lands for many years. After the legislature recognized that the wholesale giveaway of submerged lands was not in the best interest of the state, the legislature repealed the Butler Act. Unfortunately, since the repeal of the Butler Act, some courts in Florida have managed to keep the Butler Act alive by broadly interpreting its language in favor of riparian owners. Such broad interpretations have been contrary to the judicially created Public Trust Doctrine and the instructions from the Florida Supreme Court in the earliest cases interpreting both the Butler Act and its predecessor, the Riparian Rights Act, that grants under those acts should be strictly construed and read in the light most favorable to the state.

While the 1957 legislature should be commended for recognizing the folly of continuing to give away state lands at an unfathomable cost to its citizens, the current legislature needs to wake up once again and recognize that the courts are perpetuating the "Great Land Giveaway."[188] The most flexible solution to this problem would be for the legislature to grant the BOT the rulemaking authority to define what constitutes the type of improvement or development that should be allowed to divest the state of the submerged lands that it holds in trust for its citizens. In doing so, the legislature should provide guidance to the BOT and specify that dredging cannot, under any circumstances, constitute a permanent improvement or development under the Butler Act. Such action by the legislature would provide the same protection for Florida's citizens' submerged lands throughout the state.

188. Board of Trust. of the Int. Imp. Trust Fund v. Key West Conch Harbor, Inc. 683 So. 2d 144, 148 (Fla.. 3d DCA 1966) (Gersten, J., dissenting)..